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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-738

ARISON SHIPPING COMPANY,
Petitioner,

vs.

KLOSTERS REDERI A/S, d/b/a NORWEGIAN (CARIBBEAN) SHIPPING LINES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF FLORIDA

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FLORIDA APPELLATE RULES CITED

1.3 *Definitions*

"Throughout these rules unless the context or subject matter otherwise requires:

* * *

'*Rendition*' of a judgment, decision, order or decree means that it has been reduced to writing, signed and made a matter of record, or if recording is not required, then filed. A paper is deemed to be recorded when filed with the clerk and assigned a book and page number. Where there has been filed in the lower court

a timely and proper motion or petition for a new trial, for a rehearing, or other timely post-trial motion or petition permitted by the rules, the decision, judgment order or decree shall not be deemed rendered until such motion or petition is disposed of."

3.14 *Rehearing*

"a. *Time For.* Unless further time is allowed, rehearings must be applied for by petition in writing within 15 days after the filing of the decision or order of the Court.

"b. *Contents of Petition.* The petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted, and must set forth concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based.

"c. *Service.* A copy of the petition shall be served upon the opposite party or counsel and proof of such service shall be transmitted to the Court with the petition. The petition for rehearing shall not be considered a part of the record in the cause, unless so ordered by the Court, or unless rehearing is granted. No oral argument will be allowed on the petition."

* * *

3.15 *Mandate*

"a. *Issuance of Mandate.* Unless the Court, by special order shall otherwise direct, the clerk, upon the expiration of 15 days from the decision or order, shall issue such mandate or process as may be directed by the Court. When a judgment of reversal is en-

tered which requires the entry of a money judgment on a verdict the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict.

"b. *Extension of Time for Issuance of Mandate.* If a petition for rehearing is filed in a cause, the time for the issuance of the mandate or other process shall be extended until the petition is denied, or, if granted, until the cause has been fully determined; provided, however, that the court may delay the issuance of its mandate upon terms and conditions to be imposed by it after denial of rehearing for good cause if such application be made at the time of filing the petition for rehearing."

STATEMENT OF THE CASE

Klosters Rederi A/S is a Norwegian corporation (hereinafter referred to as Klosters), which owns and operates cruise ships out of the Port of Miami. On October 8, 1969, Klosters entered into a contract with petitioner, Arison Shipping Company (hereinafter referred to as Arison) appointing Arison as general agent for Klosters in the promotion, advertising and general conduct of cruise business for the ships owned by Klosters and being operated under the name of Norwegian Caribbean Lines.

Under the contract all funds collected for sale of advance reservations were remitted by travel agents and the public to Arison with the contractual requirement that all gross revenues should be deposited in Norwegian Caribbean Lines' accounts in Miami area banks within 48 hours after receipt. Because of acknowledged misappropriations and commingling of Klosters' funds by Arison, differences

arose between Klosters and Arison concerning the use and conversion of the funds as well as Arison's failure to generate the minimum funds as profits to Klosters as provided in the contract.

The contract provided for termination by Klosters without cause, as well as for cause in the event of material breach. The contract also contained a provision for arbitration of disputes.

On December 31, 1971, Klosters terminated the agreement for cause in accordance with paragraphs 10 and 12 of the contract, the termination to become effective 30 days from date of the notice as required by the contract. That notice further recited the admissions by Arison as to the misuse of funds belonging to Klosters received as deposits on future cruises from various travel agents and the use by Arison of such funds to finance other business ventures which were independent of and unrelated to the contract with Klosters. The termination letter further recited that, as of November 1, 1971, Arison acknowledged the misuse of such funds in an amount in excess of $600,000.00.

Arison replied on January 3, 1972, denying any breach, denying Klosters' right of termination and demanding arbitration.

Application was first made to the Federal District Court on February 1, 1973, for the appointment of a receiver; and District Judge King entered a stay order[1] and set a hearing for the following day. Arison, through its attorneys, appeared and challenged successfully the jurisdiction of the court on the ground that no diversity existed. Judge King in his ruling authorized Klosters to withdraw the orig-

1. The arbitration paragraph in the contract between the parties provided that any party had the right to apply to any court of competent jurisdiction for the purpose of maintaining preliminary relief to maintain the status quo.

inal complaint from the court files of the United States District Court for the Southern District of Florida and to file the same in the state court.[2]

Klosters the same day filed the same detailed and sworn complaint and affidavits in the state court, seeking an accounting and appointment of a receiver and other extraordinary relief. Relief was sought not only against Arison but against other named defendants, requesting relief which could be afforded only in equity. Among such third parties were the banks in which Arison had deposited funds belonging to Klosters. These accounts were in the name of Arison.

The unchallenged affidavits showed that *after* the termination notice given by Klosters and *after* Arison's demand for arbitration, Arison defrauded and misappropriated $1,000,000.00 of funds received for advance tickets sales and deposits belonging to Klosters.

The complaint also alleged that the books, records, reservations and advance bookings, all of which were in the possession of Arison, were vital and essential to the operation of the ships after termination February 1, 1972, and that Klosters had posted a bond of $1,500,000.00 with the Federal Maritime Commission guaranteeing its performance of the operations of the cruises for which tickets and reservations had been sold.

It alleged Arison's refusal to deliver the books and records, and its refusal to furnish any information concern-

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2. Judge King stated:

"The leave is granted to, insofar as I have authority to do so—leave is granted to the plaintiff to utilize the pleadings as they have filed herein interlineating in ink if need be the style of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida *for the immediate application of the same relief as they have here sought.*" (Emphasis added)

ing advance reservations, correspondence, accounts receivable, accounts payable to travel agents, profits, expenses or liabilities incurred by Arison with respect to the operation of the ships.

It also alleged that prior to termination notice given by Klosters on December 31, 1971, there were in existence specific escrow agreements, letters of credit, time deposits, certificates of deposit and other evidences of indebtedness from banks, trust companies and travel agents in the sum of $954,074.50, that these deposits and evidences of indebtedness were in the name of Arison in violation of the contract and that Arison refused to surrender these deposits and evidences of indebtedness.

The prayer of the complaint sought extraordinary relief by way of the appointment of a receiver without notice. The emergency application was predicated upon the sworn allegations that if notice were to be given, Arison would make further withdrawals from the bank accounts and destroy records and reservation data before the court could act. These facts were substantiated by Arison's *modus operandi* between January 1, 1972, and February 1, 1972, during the 30-day delay period required by the contract and *after* Arison's demand for arbitration.

Upon the foregoing sworn complaint and the affidavits, the Circuit Court appointed former Circuit Judge Ray H. Pearson as receiver without notice. The receivership was not of Arison but was limited to books, records, bank accounts and other assets alleged to belong to Klosters.

On the same day that the receivership proceeding (hereinafter referred to on occasion as "receiver case") was filed and the Circuit Court appointed a receiver, Arison filed a separate action to compel arbitration under the

Florida Statutes.[3] The arbitration proceeding (hereinafter referred to on occasion as "arbitration case") fell in a different division of the court; and in accordance with local rules, on February 11, 1972, on Klosters' motion, the arbitration proceeding was transferred to the division where the receivership action was pending.

Klosters filed an extended response to the petition to compel arbitration, particularly reciting the need for relief available only in equity, the appointment and functioning of a receiver and that remedies to right the wrongs alleged were not available by arbitration, but only in equity.

Thereafter, Klosters filed an amendment to that response upon learning that notwithstanding the receivership order on February 7, 1972, Arison made demand upon one of the travel agents to remit to Arison the sum of $48,000.00 representing matured ticketings for Klosters' ships.

Arison did not move for dissolution of the receivership but took an immediate appeal to the Third District Court of Appeal for the State of Florida claiming the order appointing the receiver violated Florida Rule of Civil Procedure 1.610 (but not claiming such rule was unconstitutional).

The normal, obvious and approved course of action is first to apply to the court for dissolution and then to appeal. In the absence of this the affidavits in support of the receivership are taken as true. Arison makes several incorrect and misleading statements in its petition for the writ, the principal one being that the failure to give notice was designed to deprive the Circuit Court of knowledge that another proceeding in that court had been filed to compel arbitration and that Klosters had been served with

3. That complaint is attached as Appendix "A".

process in the proceeding. Nothing could be farther from the true state of affairs. In the first place while the petition for arbitration was filed approximately one hour prior to the filing of the suit for appointment of a receiver, no assignment of that case was made until after the receiver had been appointed. This was in keeping with the rules of the Circuit Court that no assignment is made until after the close of business on the day of filing except for emergency assignments which are given a divisional assignment immediately upon filing.

Petitioner seeks to make much of the fact that it did not receive notice of the temporary stay in federal court nor the appointment of a receiver in the Circuit Court. The significant fact is that two different courts on two separate occasions examining substantially the same sworn pleadings and affidavits felt the situation was severe enough to act without notice to protect Klosters from further fraudulent misappropriations by Arison.

The order appointing the receiver was affirmed by the District Court of Appeal on March 28, 1972, Arison Shipping Company v. *Klosters Rederi A/S*, 259 So. 2d 784, *cert. denied*, 264 So. 2d 425 (1972). Arison raised no constitutional issue before the District Court of Appeal.

While petitioner makes several complaints concerning the proceedings in the trial court, petitioner never applied to the Circuit Court for any type of relief before taking an appeal of the order appointing the receiver.

Subsequent to taking the appeal, however, Arison made application to the court to fix a date for hearing on a motion to dissolve the receivership and the Circuit Court entered its order on April 13, 1972, scheduling the matter of dissolution of the receivership on its non-jury calendar commencing May 15, 1972 (Respondent's Appendix "B").

At a later hearing[4] Arison made oral application to the court to cancel the hearing date established for the motion to dissolve the receivership thereby withdrawing its oral motion to dissolve the receivership. An order cancelling the order was entered by the court on May 18, 1972 (Respondent's Appendix "C").

Arison following affirmance of the order appointing the receiver and after unsuccessful appeal from an order denying its motion to dismiss, not only filed an answer in the receivership action but also a counterclaim joining other persons as counter-defendants, who were not parties to the arbitration agreement. Demand was also made by Arison for jury trial. Upon Klosters' motion, that counterclaim was made a part of the record on appeal in the arbitration case.

The arbitration case was heard by the Circuit Court which had appointed the receiver on February 15, 1972, and the petition to compel arbitration was denied (Respondent's Appendix "D"). Arison appealed from that order. The assignments of error raised no constitutional question (Respondent's Appendix "E").

On October 18, 1972, the Third District Court of Appeal reversed, ordering compulsory arbitration. *Arison Shipping Company* v. *Klosters Rederi A/S*, 268 So. 2d 428 (1972). After obtaining leave until November 12, 1972, by court order on October 31, 1972 (Respondent's Appendix "F"), Klosters filed a timely petition for rehearing staying the issuance of mandate by the Third District Court of Appeal.[5] The petition for rehearing was denied on Novem-

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4. Subsequent to the denial by the District Court of Appeal of Arison's petition for rehearing on March 28, 1972, and prior to the denial of Arison's petition for certiorari on the appointment of the receiver without notice by the Florida Supreme Court on June 30, 1972.

5. Florida Appellate Rule 3.15(b).

ber 28, 1973. Klosters obtained an automatic stay of the Third District mandate compelling arbitration by the filing of a timely petition for certiorari to the Supreme Court of Florida. Certiorari was granted and the matter was argued before the Florida Supreme Court on the merits.

On May 30, 1973, almost one full year after it had denied writ of certiorari to Arison on the question of the appointment of a receiver without notice, the Florida Supreme Court quashed the reversal by the District Court of Appeal and remanded with directions to reinstate the order of the trial court denying compulsory arbitration. No federal question was raised or presented by Arison in the Supreme Court of Florida nor was any such question decided by the Florida Supreme Court in the arbitration case (nor for that matter in Arison's petition for certiorari in the receivership case).

In a petition for rehearing in the Florida Supreme Court in the arbitration case, Arison for the first time, in either case, attempted to raise the federal question. That petition accordingly raised a new posture not taken previously, and in contravention of the procedural appellate rule on rehearing.[6] Arison's petition for rehearing was denied and the mandate of the Florida Supreme Court issued on August 10, 1973.

Finally, it is extremely important to note, contrary to Arison's factual statement, that from February 2, 1972, through the present date the receiver has continued to function, holding in excess of $1,500,000.00 of assets allegedly improperly in the custody of Arison and others. Hence, the contention that the reversal by the Florida

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6. Florida Appellate Rule 3.14(b) provides in part: "The petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted. . . ."

Supreme Court of the order compelling arbitration reinstated the receiver is pure fabrication since the receiver was never ousted from his office.

With reference to the designation of the parties, Arison Shipping Company was the sole plaintiff and appellant below. Consequently, the reference in the petition for writ to petitioners is inaccurate, as is the name of the respondent which should be d/b/a Norwegian Caribbean Lines.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Summary of Argument

I. The petition for writ raises no substantial federal question of national importance under 28 U.S.C. § 1257(3).

A. The appointment without notice of a receiver *pendente lite* in the receiver action was interlocutory and did not constitute a final order depriving Arison of a final right and was necessary to the relief requested by Klosters in the receiver action.

B. Petitioner did not petition for certiorari to review the decision of the Supreme Court of the State of Florida entered on the 30th day of June, 1972, refusing to review the decision of the District Court affirming the appointment of the receiver, and the time has long expired for reviewing that decision and it cannot be reviewed by seeking a review of the order denying compulsory arbitration.

C. The principal cases relied upon by Arison deal with summary statutory seizure remedies. They have no application to equitable actions where the receivership without notice was found to be necessary.

D. The validity of Florida Rules of Civil Procedure Nos. 1.610 and 1.620 was not questioned by Arison in the receiver case.

E. The issue of the receiver was not moot at the time petition for certiorari could have been requested in the receiver case.

F. The validity of Florida Rules of Civil Procedure Nos. 1.610 and 1.620 was not questioned in the arbitration case.

G. The petition for rehearing in the arbitration case is not part of the record before this Court.

II. The decision of the Florida Supreme Court in the arbitration case was based upon independent, non-federal grounds and did not involve any issue of due process.

ARGUMENT

I. The Petition for Writ Raises No Substantial Question of National Importance under 28 U.S.C. § 1257 (3).

A. The Appointment Without Notice of a Receiver Pendente Lite in the Receiver Action Was Interlocutory and Did Not Constitute a Final Order Depriving Petitioner of a Final Right and Was Necessary to the Relief Requested by Respondent in the Receiver Action.

Arison claims that the ex parte appointment of the receiver by the trial court in the receivership case arbitrarily deprived petitioner of property without due process of law. It should be borne in mind that the appointment of the receiver pendente lite was not for the business but was limited to receiving and preserving property and assets pending the outcome of the receiver case. The limited receivership order was interlocutory and not finally determinative of the petitioner's rights. There was consequently no Fourteenth Amendment violation. *12 Wright & Miller, Federal Practice and Procedure*, § 2983 at 27-28; *1 Clark, Receivers*, Third Edition 1959, § 82 at 124-125.

It should be noted that in federal court notice is not a mandatory requirement for the appointment of receivers either by rule or statute. See 28 U.S.C. § 754, § 959, and Federal Rule of Civil Procedure 66. A court of equity has always been held to have the power to appoint a receiver without notice when the giving of notice would defeat the very purpose of the receivership. *Arkansas Louisiana Gas Company* v. *Kroeger*, 303 F. 2d 129 (5th Cir. 1962), *cert. denied* 371 U.S. 887 (1962); *Tennessee*

Publishing Company v. *Carpenter*, 100 F. 2d 728 (6th Cir. 1938), *cert. denied* 306 U.S. 659 (1939). Whether or not the exigencies of the situation dictated the appointment of the receiver without notice was a matter within the sound discretion of the trial court.

In the receivership case the sworn complaint supported by affidavits alleged that Arison had converted funds of the respondent and that Arison was in a position to commit further misappropriations because substantial sums belonging to Klosters were in bank accounts in Arison's name. The giving of notice of the appointment of a receiver would have precipitated withdrawal of these large sums and afforded an opportunity for destruction of the books and records relating to passenger reservation lists which were essential to the operation of the ships.

Arison recognizes that notice is not required in extraordinary situations (Petition for Writ, pages 8-9), but discounts the facts of the receiver case as not constituting such an extraordinary situation. Nevertheless, the cases cited above stand for the proposition that the appointment of a receiver is within the discretion of a court of equity and reviewable only as to an abuse thereof. The appellate courts of the State of Florida have made such a review and found no such abuse. This Court will not review on certiorari orders grounded upon the exercise of judicial discretion. *Arkansas Louisiana Gas Co.* v. *Kroeger*, supra.

B. Petitioner Did Not Petition for Certiorari to Review the Decision of the Supreme Court of the State of Florida Entered on the 30th Day of June, 1972, Refusing to Review the Decision of the District Court Affirming the Appointment of the Receiver, and the Time Has Long Expired for Reviewing That Decision and It Cannot Be Reviewed by Seeking a Review of the Order Denying Compulsory Arbitration.

The decision of the Supreme Court in the receivership case became final on the 30th day of June, 1972. The time for seeking a review of that order has long since expired. A review of the receivership ruling of the Supreme Court of Florida by an abortive attempt to tie it to the arbitration decision is precisely what is being here attempted contrary to law and the rules of this Court. If the petitioner was going to seek review of that order it should have sought the writ by petition from that order and not wait until over a year later and seek to review it in an entirely different case which is not even a collateral proceeding.

C. Principal Cases Relied upon by Arison Deal with Summary Statutory Seizure Remedies. They Have No Application to Equitable Actions Where the Receivership Without Notice Was Found to Be Necessary.

Arison argues for an extension of this Court's decision in *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969) and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). These cases both involve summary statutory seizure remedies in actions at law. The case at bar involves an equitable action for breach of trust and fiduciary duties and for an accounting with the appointment of a receiver without

notice to preserve the books, papers and assets necessary to make any final equitable judgment enforceable. Klosters agrees that procedural due process applies as well to equitable actions as to actions at law. However, it is obvious that the nature of the relief sought in equity will at times necessitate that an equity court act without notice to preserve the *status quo* pending a final hearing. The legal actions of attachment and replevin considered by this Court in the *Sniadach* and *Fuentes* cases are summary statutory remedies wherein the writ issues as a matter of course by the clerk upon compliance with the statute.

In *12 Wright & Miller, Federal Practice and Procedure,* § 2983 at 28, the writers quote from *Clark on Receivers* as follows:

> "The appointment of a receiver without notice in exceptional cases does not violate the due process clause of the U. S. Constitution, because the appointment is primarily to receive and preserve the property. The appointment is interlocutory; it does not constitute a final order adjudicating a final right."

D. The Validity of Florida Rules of Civil Procedure Nos. 1.610 and 1.620 Was Not Questioned by Arison in the Receiver Case.

In point of fact, Arison never questioned the constitutionality of Florida Rules of Civil Procedure 1.610 and 1.620 until the petition for writ to this Court.

Arison in its petition (pp. 7-8) admits the validity of the principle that constitutional defenses should be raised at the earliest possible time or be waived. Indeed, this Court in *Edelman* v. *California,* 344 U.S. 357 (1953), cited by Arison, refused to review the constitutionality

of a state vagrancy statute because the issue was first raised on appeal.

The earliest opportunity for attacking the validity of these rules occurred in the trial court in the receiver case where Rule 1.610 explicitly authorizes a motion to dissolve the receivership. Actually, Arison had the Circuit Court enter an order setting a motion for hearing on the dissolution of the receivership, but voluntarily withdrew its application for dissolution, thus waiving any lack of notice. Respondent's Appendices "B" and "C". See 65 *Am. Jur. 2d,* (Receivers), § 98 at 931-932.

Arison did not petition or move for dissolution of the receivership case in the trial court but rather took an interlocutory appeal. The validity of Rules 1.610 and 1.620 was not argued but rather Arison contended that the rules had been violated. Thus, on page 18 of petitioner's brief to the Florida District Court of Appeal in the receiver case, it states in part as follows:

> "The law requiring notice is so well settled and academic that we will not belabor it here. See: Rules 1.610 and 1.620, Fla. R.C.P.; . . . ."

E. The Issue of the Receiver Was Not Moot at the Time Petition for Certiorari Could Have Been Requested in the Receiver Case.

In an effort to excuse the failure to seek review by this Court of the decision of the Supreme Court of Florida refusing to review the decision of the Third District in affirming the appointment of the receiver, Arison argues that it was prevented from petitioning this Court for relief on the due process issue during the 90-day period for the filing of a petition for such a writ because the Florida District Court of Appeal in the separate and distinct arbi-

tration case had reversed the trial court and ordered compulsory arbitration. Arison looks upon this as an automatic ouster of the receiver and termination of the receivership. That result does not follow as compulsory arbitration is not incompatible with a receivership. The need for preservation of assets continued. The order of the District Court compelling arbitration may have furnished a basis for moving for dissolution of the receivership but that order, in an entirely different case, was not self-executing. Furthermore, Arison well knew that the respondent would petition the Supreme Court of Florida to review the arbitration decision. Indeed, since the receiver was holding property pending final decision affecting a number of parties (i.e. Ted Arison, Georgian Bay Lines, Inc., Mr. Brain, Inc. and three different banks) not involved in the arbitration case, the outcome of the arbitration case could not control the receiver case.

Further, in the receiver case, August 7, 1972, was not the proper date from which to measure the 90-day period in which to petition for writ of certiorari in this Court. June 30, 1972, the date the Florida Supreme Court rendered its decision in the receiver case, was the measuring date, since the Florida Supreme Court does not issue a mandate on denial of a writ of certiorari. The reference to the August 7, 1972, date as equivalent to the date upon which mandate was issued, therefore, is completely erroneous.

Rule 1.3 of the Florida Appellate Rules defines "rendition" of a judgment, decision, order or decree as the fact that "it has been reduced to writing, signed and made a matter of record, or if recording is not required, then filed." This appellate rule was amended in 1958 to delete the statement that "a judgment or decision of an appellate court shall not be deemed rendered until the mandate is issued". See "Author's Comment", Florida Appellate Rule 1.3, 32 *Florida Statutes Annotated* 15.

Even assuming that August 7, 1972, was the proper date from which to measure, within that period, on October 31, 1972, Klosters obtained an order of the District Court of Appeal extending until November 12, 1972, the time within which a petition for rehearing could be filed in that court regarding the decision on the arbitration. Respondent's Appendix "F".

Upon denial of Klosters' petition for rehearing by the District Court on November 28, 1972, respondent filed a petition for certiorari with the Florida Supreme Court within the 15-day period provided by Florida Appellate Rules, thereby obtaining an automatic stay of the mandate compelling arbitration. Hence, the question of direct attack on the receiver's appointment was never rendered moot by the arbitration decision of the District Court of Appeal.

F. The Validity of Florida Rules of Civil Procedure Nos. 1.610 and 1.620 Was Not Questioned in the Arbitration Case at Bar.

In the arbitration case, which is the only case from which a petition for certiorari to this Court has been filed, lack of notice of the hearing on the appointment of the receiver was obviously not an issue to be considered in determining whether the parties should be required to arbitrate. The constitutional issue was not raised until Arison's petition for rehearing to the Florida Supreme Court. Even then Arison did not challenge the validity of the Florida Rules of Civil Procedure 1.610 and 1.620; it merely asserted that the denial of compulsory arbitration violated its rights under the Fourteenth Amendment. Arison now seeks to have this Court adjudicate the constitutionality of the Florida Rules of Civil Procedure 1.610 and 1.620 though that issue was not raised at any time.

The validity of Florida Rules of Civil Procedure 1.610 and 1.620 never having been drawn in question before the Florida appellate courts, this Court should not grant Arison's writ of certiorari on that issue. *New York ex rel. Brant* v. *Zimmerman*, 278 U.S. 63 (1928); *Street* v. *New York*, 394 U.S. 576 (1969). Even if the general reference in the motion for rehearing before the Florida Supreme Court in the arbitration case to the lack of due process in the appointment of the receiver is construed to call into question the validity of the above mentioned Rules of Civil Procedure, raising the question for the first time in the petition for rehearing comes too late for consideration by this Court. *Simmerman* v. *Nebraska*, 116 U.S. 54 (1885); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179 (1919); *Herndon* v. *Georgia*, 295 U.S. 441, rehearing denied 296 U.S. 661 (1935).

G. The Petition for Rehearing in the Arbitration Case Is Not Part of the Record Before This Court.

Florida Appellate Rule 3.14(c) explicitly states that a petition for rehearing does not become a part of the record unless the petition is granted or unless the Florida court so orders. In the case at bar, the petition was denied and the Florida Supreme Court did not order it made part of the record. Hence, the constitutional issue is not properly before this Court and certiorari should not be granted. *Wilson* v. *Cook*, 327 U.S. 474 (1946); *Wall* v. *Chesapeake & O. R. Co.*, 256 U.S. 125 (1921); *Citizens Nat. Bank* v. *Durr*, 257 U.S. 99 (1921).

The untimeliness of the assertion of the unconstitutionality for the first time in the petition for rehearing is especially true in view of the obvious violation of Florida Appellate Rule 3.14(b) which requires the petition for rehearing not assert a new ground from that taken in the original argument or briefs.

It is to be remembered that the receivership action and the arbitration proceedings were wholly separate and independent actions. The former was filed by Klosters and the latter by petitioner.

The attempted insertion of a constitutional issue into the arbitration case at the rehearing stage was obviously an attempt to bootstrap the constitutional issue into a case where it does not belong in an attempt to confer jurisdiction upon this Court.

II. The Decision of the Florida Supreme Court in the Case at Bar Was Based upon Independent, Non-Federal Grounds and Not upon a Denial of Due Process.

The decision of the Florida Supreme Court in the case at bar was based upon the well-founded principle that compulsory arbitration will not operate to oust a court of equity of jurisdiction where the action sounds in fraud and breach of trust and fiduciary duties. The validity of that principle does not depend upon the method by which the Florida court assumed jurisdiction.[7] Furthermore, equity had taken jurisdiction. It had appointed a receiver and the receiver was functioning. It is elemental that when equity assumes jurisdiction it assumes it for all purposes. Equity cannot be ousted of its jurisdiction, once assumed, by a contractual provision for arbitration.

The Florida Supreme Court's decision in the arbitration case at bar could as well have been handed down if the trial court in the receiver case had appointed a receiver after notice to all parties affected. It was not the manner of the assumption of jurisdiction by the equity court in the

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7. See opinion of Supreme Court of Florida and citations therein. *Petitioner's* Appendix "A".

receiver case that determined the decision in the arbitration case, but the fact of the assumption of jurisdiction.

That the Florida Supreme Court concluded in passing (at the end of its opinion) as a matter of law that petitioner had by its subsequent conduct in the receiver case waived its right to compulsory arbitration, does not obviate the fact that the Florida court's decision in the arbitration case did not evolve from any hearing where due process questions were at issue.

Since the Florida Supreme Court's decision in the arbitration case at bar rests on independent, non-federal grounds, this Court should not take jurisdiction. *Lynch* v. *New York*, 293 U.S. 52 (1934).

CONCLUSION

The exigencies of the situation dictated the appointment of a receiver without notice and the appointing court so found. That finding and the exercise of that discretion does not present a federal question and it should not be reviewed by this Court on certiorari. It was incumbent upon Arison to raise any due process argument in the receiver case, and having failed to do so, it may not do so in the arbitration case where the decision of the Florida Supreme Court does not rest at all upon matters of procedural due process. It was also incumbent upon Arison to seek any review of the receivership order in the receivership action. That order cannot be reviewed in the arbitration action which is wholly independent of the receivership proceedings. This is but an abortive attempt to seek review of an order which is no longer reviewable because of the passage of time.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

.....

HERBERT L. NADEAU, ESQ.

PATTON, KANNER, NADEAU,
SEGAL, STOBS & ZELLAR
150 S. E. 2nd Avenue
Miami, Florida 33131
Of Counsel

CERTIFICATE OF SERVICE

I, Herbert L. Nadeau, a member of the Bar of this Court, do hereby certify that on the ..... day of December, 1973, I deposited in the United States mail, first class, postage prepaid, three copies of the foregoing brief in opposition to petition for writ of certiorari to Supreme Court of Florida, addressed to petitioner's counsel of record as follows:

Cadwalader, Wickersham & Taft
Stephen N. Shulman
Robert T. Lasky
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Heiman and Crary
Eugene C. Heiman
Suite 500 Brickell Executive Tower
1428 Brickell Avenue
Miami, Florida 33131

.....

HERBERT L. NADEAU

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

NO. 72-2327

ARISON SHIPPING COMPANY,
a Florida corporation,
Plaintiff,

vs.

KLOSTER'S REDERI A/S,
a Norwegian Corporation,
Defendant.

Petition to Compel Arbitration

Plaintiff, ARISON SHIPPING COMPANY, a Florida corporation, sues the Defendant, KLOSTER'S REDERI, A/S, a Norwegian corporation, and says:

1. On or about October 8, 1969, the parties entered into an agreement in writing, a copy of which is attached hereto and marked "Exhibit A".

Paragraph 16 of that agreement provides for arbitration pursuant to Chapter 682, Florida Statutes.

2. On or about January 3, 1972, Plaintiff made demand for arbitration pursuant to said agreement and said statute. "Exhibit B".

3. Defendant has failed and refused, and still fails and refuses to arbitrate the disputes described in "Exhibit B".

4. No substantial issue exists as to the making of the agreement attached as "Exhibit A".

5. All conditions precedent to the filing of this Petition, pursuant to Section 682.03, Florida Statutes, have been performed or have occurred.

WHEREFORE, Plaintiff prays the Court to summarily hear this Petition and to grant this Petition and application to compel arbitration.

DATED February 2, 1972.

Heiman and Crary, P.A.

Attorneys for Plaintiff
1150 S.W. First Street
Miami, Florida 33130
By /s/ Eugene C. Heiman

APPENDIX B

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

CASE NO. 72-2342

KLOSTERS REDERI A/S, doing business as NORWEGIAN CARIBBEAN LINES,
Plaintiff,

vs.

ARISON SHIPPING COMPANY, a Florida corporation, et al.,
Defendants.

Order

Application having been made to the Court to fix a date for a hearing on a motion to dissolve the receivership, the Receiver having been heretofore appointed without notice, it is

ORDERED AND ADJUDGED that the matter of the dissolution of the receivership be and it is hereby scheduled as an item to be called on the Court's non-jury trial calendar commencing with the period May 15, 1972.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 13 day of April, 1972.

/s/ Francis J. Christie
Circuit Judge

Copies Furnished to:
Heiman and Crary, P.A.
Patton, Kanner, Nadeau, Segal & Stobs
Ray H. Pearson, Esq.
Paige & Catlin
Arnold Nevins, Esq.
William B. Roman, Esq.

APPENDIX C

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

Case No. 72-2342
Judge Christie

KLOSTERS REDERI A/S, doing business as NORWEGIAN CARIBBEAN LINES,
Plaintiff,

vs.

ARISON SHIPPING COMPANY, a Florida corporation, et al.,
Defendants.

Order

Oral application having been made to the Court to fix a date for a hearing on a Motion to Dissolve the Receivership, the Court having set the same down for hearing on its non-jury calendar, and Defendants, at a subsequent hearing, having withdrawn said oral application, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the date for hearing of Defendant's Motion to Dissolve the Receivership heretofore fixed by this Court be and the same is hereby cancelled there being no written or oral Motion presently pending before this Court.

DONE AND ORDERED at Miami, Dade County, Florida this 18 day of May, 1972.

/s/ Francis J. Christie
Circuit Judge

Copies furnished to:

Attorneys for Defendants:
Heiman & Crary, P. A.
1150 S. W. First Street
Miami, Florida

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Miami Beach, Florida

William B. Roman, Esq.
Pan American Bank Building
Miami, Florida

APPENDIX D

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. 72-2327 Judge Christie

ARISON SHIPPING COMPANY,
a Florida corporation,
Plaintiff,

vs.

KLOSTERS REDERI A/S, a Norwegian corporation,
Defendant.

Order Denying Arbitration

This cause came on to be heard upon the petition of the plaintiff to compel arbitration and the response of the defendant thereto and an amendment to the response. Upon argument of counsel and the Court being fully advised in the premises, it is upon consideration

ORDERED AND ADJUDGED that the plaintiff's petition to compel arbitration be and the same is hereby denied.

DONE AND ORDERED at Miami, Dade County, Florida, this 15 day of February, 1972.

/s/ Francis J. Christie
Circuit Judge

APPENDIX E

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 72-2327 (Christie)

ARISON SHIPPING COMPANY,
a Florida corporation,
Plaintiff,

vs.

KLOSTERS REDERI A/S, a
Norwegian corporation,
Defendant.

Assignments of Error

Plaintiff, ARISON SHIPPING COMPANY, a Florida corporation, assigns as the errors on which it will rely on appeal the following:

1. The Court erred in entering the Order Transferring Division dated February 11, 1972.

2. The Court erred in entering the Order Denying Arbitration dated February 15, 1972.

Heiman and Crary, P.A.
Attorneys for Plaintiff
1150 S. W. First Street
Miami, Florida 33130

by: .....
Eugene C. Heiman, Of Counsel
Telephone: 377-0802

I HEREBY CERTIFY that a true and correct copy of the above Assignments of Error was mailed this 21st day of March, 1972, to PATTON, KANNER, NADEAU, SEGAL & STOBS, Attorneys for Defendant, 150 S. E. Second Avenue, Miami, Florida.

by: .....
Eugene C. Heiman, Of Counsel

APPENDIX F

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1972

TUESDAY, OCTOBER 31, 1972

CASE NO. 72-299

ARISON SHIPPING COMPANY,
a Florida corporation,
Appellant,

vs.

KLOSTERS REDERI A/S, a
Norwegian corporation,
Appellee.

Upon motion of appellee, it is ordered that the time to file petition for rehearing is extended up to and including November 12, 1972.

A True Copy

Attest:

/s/ Willard Herst
Clerk District Court of Appeal, Third District

cc: Patton, Kanner, Nadeau, Segal & Stobs
Heiman & Crary
/h